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In The

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

ABNER MORGAN, JR.,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE IMPACT FUND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, PUBLIC ADVOCATES, INC., THE WESTERN CENTER ON DISABILITY RIGHTS, PROTECTION AND ADVOCACY, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, EQUAL RIGHTS ADVOCATES, THE ASIAN PACIFIC AMERICAN LEGAL CENTER, THE LEGAL AID FOUNDATION OF LOS ANGELES AND THE MICHIGAN CIVIL RIGHTS DIVISION IN SUPPORT OF THE RESPONDENT

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BRIEF OF *AMICI CURIAE*

The non-profit civil rights organizations and public agency listed below respectfully submit this brief as *amici curiae*.[1] The brief supports the position of respondent Abner Morgan, Jr. and urges the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit. The parties have filed a stipulation with the Court, consenting to the filing of all briefs of *amici curiae*.

INTEREST OF THE *AMICI CURIAE*

The Impact Fund is a non-profit legal foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund focuses its resources on cases which raise issues of civil and human rights, poverty and environmental justice. The Impact Fund is currently litigating several race and gender discrimination class actions under Title VII.

Disability Rights Education and Defense Fund, Inc. (DREDF), based in Berkeley, California, is a national law and policy center dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts, fighting to ensure that people with disabilities have the legal protections necessary to vindicate their right to be free from discrimination.

Public Advocates, Inc. is a non-profit, public interest law firm, one of the oldest public interest law firms in the nation. Throughout its history, the firm's mission has

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[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

been to challenge the persistent, underlying causes and effects of poverty and discrimination and to work for the empowerment of the poor and people of color. Public Advocates uses diverse litigation and non-litigative strategies to handle exclusively policy and impact cases.

The Western Law Center for Disability Rights (WLCDR) is a non-profit organization that protects and enforces the civil rights of people with mental and physical disabilities. Since 1975, the WLCDR has handled disability rights cases, including numerous employment, housing, and access cases under California and federal civil rights laws. The WLCDR provides assistance to persons with disabilities through litigation, mediation, education, and referrals to other agencies.

Protection and Advocacy, Inc. (PAI) is a non-profit organization that provides legal and other advocacy assistance to Californians with disabilities, including physical, learning, sensory, mental health and developmental disabilities. Since 1978, PAI has handled disability rights cases, including employment cases under federal and state law. Last year, PAI provided assistance to 245 individuals with disabilities regarding employment-related matters.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases under Title VII since the organization's founding. Preserving the right of Latinos to be free of discrimination in all aspects of employment is a primary goal of MALDEF Employment program.

Equal Rights Advocates (ERA) is a San Francisco-based human and civil rights organization dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation and advocacy. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has undertaken difficult impact litigation that has resulted in establishing new law and has provided significant benefits to large groups of women.

The Asian Pacific American Legal Center of Southern California (APALC) is the largest provider of direct legal services, civil rights advocacy, community education and impact litigation for low-income Asian Pacific Americans in the country. Since 1982, APALC has represented Asian Pacific Americans in a number of areas, including anti-discrimination, workers' rights, family law, immigration and hate crimes.

The Legal Aid Foundation of Los Angeles (LAFLA) has been providing civil legal services to low-income people in metropolitan Los Angeles for over 70 years. Through litigation and other representation, LAFLA helps working poor and low-wage workers address problems with pay, including minimum wage, overtime, and other pay-related problems, retaliation and discrimination in the workplace, and problems faced by former welfare recipients who are now working.

The Michigan Department of Civil Rights (MDCR) is a principal department of Michigan state government and is charged with enforcing the state's anti-discrimination laws. The state anti-discrimination laws which MDCR enforces prohibit, *inter alia*, discrimination in employment based upon religion, race, color, national origin, age, sex, height, weight, marital status or disability.

SUMMARY OF ARGUMENT

Although the continuing violation doctrine has been applied under Title VII since the early days of the statute, defendant and petitioner National Railroad Passenger Corporation ["Amtrak"] has argued that the doctrine should be recognized only in hostile environment harassment cases – and even then, should be unavailable if, before the start of the limitations period, the plaintiff knew or should have known that she (or he) was the victim of discrimination. *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1999).

Use of a "knew or should have known" standard in applying the continuing violation doctrine would have serious consequences in hostile environment sexual harassment cases. Sociological and psychological research has proven that the *least frequent* response by victims of sexual harassment is filing a formal complaint or a lawsuit. Because of fear of retaliation, humiliation and career detriment, women employees generally pursue informal, non-confrontational methods to try to stop sexual harassment, consistent with this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Under Amtrak's proposed standard, female employees who used any informal complaint processes would probably be held to have demonstrated that they "knew or should have known" that they were victims of discrimination. Consequently, the continuing violation doctrine would cease to apply in hostile environment cases, where even Amtrak concedes it is appropriate.

A "knew or should have known" standard of continuing violation would severely harm the rights of employees with disabilities. The Court's interpretation of the continuing violation doctrine under Title VII applies

equally to the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (ADA), because Title I of the ADA incorporates Title VII's procedures, including its statute of limitations. 42 U.S.C. § 12117(a). Employees with disabilities must identify their disability and engage in ongoing interactive dialogue with their employer to find reasonable accommodations for their disabilities. By doing so, however, they will arguably be demonstrating that they "knew or should have known" that they were being discriminated against, thus triggering the statute of limitations and making the continuing violation doctrine unavailable.

Amtrak's further argument that the continuing violation doctrine cannot apply to a "discrete discriminatory act" is irrelevant here. In five years at Amtrak, Abner Morgan, Jr. was disciplined or counseled *ten* times, was denied training and other career opportunities *five* times, and experienced *three* acts of retaliation – all in the context of a racially hostile environment which demeaned and insulted African-American employees. The same five managers perpetrated all these incidents and created the racially hostile environment. The Ninth Circuit properly held the particular incidents must be viewed as part of the same continuing violation.

In addition to the Ninth Circuit's analysis, this Court should take guidance from the California Supreme Court's careful and thorough review of the continuing violation doctrine in *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798 (2001). Although *Richards* interpreted the California Fair Employment and Housing Act (FEHA), Cal. Government Code, §§ 12900 *et seq.*, its analysis is persuasive in interpreting Title VII because the objectives and relevant wording of the two statutes is so similar.

Richards rejected the "knew or should have known" test urged by Amtrak.

Adoption of the Ninth Circuit or the *Richards* test for continuing violation will not unfairly harm employers. There is no empirical evidence that workers purposely delay in filing EEOC charges to win some alleged financial or strategic advantage. In fact, delay does not benefit employees financially. Title VII restricts compensation through its two-year limit on backpay and its stringent caps on compensatory and punitive damages.

Finally, this court's previous interpretations of section 706(e) are irrelevant here because the earlier decisions did not involve the continuing violation doctrine. They all concerned a single, time-barred act, not as in this case, a lengthy series of related acts, many of which were within the limitations period.

ARGUMENT

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 bars employment discrimination on the basis of race, *inter alia*. 42 U.S.C. §§ 2000e-2 *et seq*. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), requires employees claiming unlawful discrimination to file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days "after the alleged unlawful employment practice occurred." If the employee first files with a state or local agency, the time to file with the EEOC is 300 days. *Ibid.*

From early in the history of Title VII, courts have recognized the "continuing violation doctrine" as an equitable exception to the statute of limitations in section 706(e). *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 754 (3d

Cir. 1995).[2] As its name suggests, the continuing violation doctrine may be applied when discriminatory conduct continues over a considerable period of time, some of which is before the start of the limitations period. Where applicable, the doctrine permits the aggrieved employee to introduce evidence of, and recover damages for, both the pre- and post-limitations period discrimination so long as the employee files an EEOC charge within 180 (or 300) days after the last occurrence of discrimination. *West v. Philadelphia Elec. Co., supra*, 45 F.3d at 755.

A plaintiff can establish a continuing violation by showing a series of related acts, one or more of which are within the limitations period – a serial violation. *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir. 1990). Alternatively, the plaintiff can show a systematic policy or practice of discrimination that operated, in part, within the limitations period – a systemic violation. *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir. 1982). The present case involves a serial violation.

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[2] The continuing violation doctrine was applied in numerous early Title VII decisions. *See, e.g., Cox v. U.S. Gypsum Co.*, 409 F.2d 289, 290 (7th Cir. 1969) [layoff and refusal to recall constitute continuing violations]; *Sciaraffa v. Oxford Paper Co.*, 310 F.Supp. 891, 896-897 (D. Me. 1970) [same]; *Moreman v. Georgia Power Co.*, 310 F.Supp. 327, 328 (N.D. Ga. 1969) [use of discriminatory tests is continuing violation]; *King v. Georgia Power Co.*, 295 F.Supp. 943, 946 (N.D. Ga. 1968) [maintenance of racially segregated facilities and promotional opportunities constitute continuing violations].

A. USE OF A "KNEW OR SHOULD HAVE KNOWN" TEST UNDER THE CONTINUING VIOLATION DOCTRINE WOULD PARTICULARLY HARM VICTIMS OF SEXUAL HARASSMENT.

The rule proposed by Amtrak would wreak havoc in hostile environment sexual harassment cases, which involve ongoing patterns of abuse that are especially well-suited to the continuing violation doctrine. *See West v. Philadelphia Elec. Co., supra,* 45 F.3d at 755 ["natural affinity" between hostile work environment and continuing violation claims]; *Draper v. Coeur Rochester, Inc.,* 147 F.3d 1104, 1108 (9th Cir. 1998) [same]. Sociological and psychological research has demonstrated that the *least frequent recourse* by victims of sexual harassment is filing a formal complaint or a lawsuit. Since Amtrak's proposed standard would *require* an employee to file an EEOC charge as soon as she knew or should have known that she was being harassed – or be barred from recovering for all conduct before the limitations period – employers would escape liability for most sexual harassment.

Two major academic articles extensively analyze women's responses to sexual harassment. *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment,* 51 Journal of Social Issues 117 (1995) by Fitzgerald, Swan and Fischer, and *Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution,* 42 Journal of Vocational Behavior 102 (1993) by Lach and Gwartney-Gibbs. *See also* Note, *Notice in Hostile Environment Discrimination Law,* 112 Harv.L.Rev. 1977 (1999). The Fitzgerald and Lach articles, in turn, review over 100 other sexual harassment studies.

The Fitzgerald article concludes, "By far the *most infrequent response* is to seek institutional/organizational relief (i.e., notifying a supervisor, bringing a formal complaint, and filing a lawsuit). Victims apparently turn to such strategies as a last resort when all other efforts have failed." Fitzgerald, et al., *supra,* at 121 [italics added]. The most common responses, according to Fitzgerald, are the least confrontational ones: "victims are more likely to talk with a supervisor than to file a formal complaint, and legal claims are by far the least common response – truly the 'court of last resort.' " *Ibid.* Even among women who labeled their experience as harassment – and thus presumably met Amtrak's "knew or should have known" standard – one national study found that 74 percent responded by telling the harasser to stop while only 12 percent filed a complaint of any kind. *Id.* at 122.

The Lach article similarly reports that women prefer to resolve harassment disputes through informal means, such as stalling or ignoring the harasser; confronting the harasser either politely or more directly; or reporting the harasser to a higher authority. Only a very small number used "formal complaint channels," presumably internal complaint procedures. Lach, et al., *supra,* at 110.

The most common reason for not formally reporting harassment is fear, according to both articles – fear of retaliation, of not being believed, of hurting one's career, or of being humiliated. Sadly, retaliation is common and the most assertive employees suffer the greatest costs. One study of female state employees reported that 62 percent of those who complained of sexual harassment experienced retaliation, including lowered job evaluations, denial of promotions, and being transferred or fired. In a survey of sexual harassment of federal workers

conducted by the U.S. Merit Systems Protection Board, one-third of employees who filed formal claims said it only "made things worse." According to a study of sexual harassment in the Navy, one-third of harassment victims reported they were humiliated in front of others when they complained. Another survey concluded that women who responded assertively to harassment had more negative outcomes in terms of their jobs, their emotional well-being and their health. Fitzgerald, et al., *supra*, at 122-123. Lach, et al., *supra*, at 110-111.

Retaliation by potential future employers is also a serious problem. In a 1992 survey of 1100 California companies, 75-80 percent of the responding employers admitted they would not give equal consideration to job applicants who had sued their former employers for wrongful termination, sexual harassment, unequal pay or failure to promote, even if the suits were valid and justifiable. Applicants who were in the midst of litigation fared even worse; 87 percent of the respondents would not consider the person equally with other candidates. Spoon & Ellis, *The Litigation Stigma: Lawsuits Come Back to Haunt*, 70 HR Focus No. 2, p. 19 (Feb. 1993).

Thus, Amtrak's proposed "knew or should have known" standard would have a devastating effect on sexual harassment victims. It would deny relief for events which were part of an ongoing pattern of discriminatory treatment but were not the subject of an immediate EEOC charge. An employee who tried to work out problems informally with her employer – as most women do and as this Court *required* in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) – would face the very real danger that a court would decide she had waited too long and had

forfeited her right to relief for the earlier incidents because she knew or should have known the initial conduct was discriminatory. And because creation of a hostile work environment depends on the accumulation of many incidents, excluding the earlier incidents would make it far more difficult for the plaintiff to establish liability for the later events that were within the limitations period.[3]

Moreover, if the employee did file a discrimination charge and pursue litigation at the time of the first discriminatory act, that conduct, standing alone, might not survive summary judgment if the challenged actions were not sufficiently "severe or pervasive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993); *Baskerville v. Culligan Internat'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995). The bottom line is that, under Amtrak's proposed standard, hostile environment sexual harassment victims run the real risk of being both too early and too late.[4]

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[3] *See Anderson v. Reno*, 190 F.3d 930, 934 (9th Cir. 1999) [district court found no hostile environment after excluding earlier incidents; appellate court reversed, finding continuing violation]; *Draper v. Coeur Rochester, Inc., supra*, 147 F.3d 1104 [same]; *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1418 (10th Cir. 1993) [same].

[4] Federal courts have sometimes recognized that using the "knew or should have known" standard produces such draconian results that they have not strictly applied the test. *See, e.g., O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001) [continuing violation doctrine applied because female firefighter, who endured nearly four years of intense sexual harassment before filing EEOC charge, might not have realized there was actionable discrimination].

B. USE OF A "KNEW OR SHOULD HAVE KNOWN" TEST UNDER THE CONTINUING VIOLATION DOCTRINE WOULD INJURE THE RIGHTS OF EMPLOYEES WITH DISABILITIES, BY TRIGGERING THE STATUTE OF LIMITATIONS DURING THE REASONABLE ACCOMMODATION PROCESS.

Adoption of the "knew or should have known" standard of continuing violation would injure the rights of employees with disabilities. Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (ADA), incorporates the enforcement procedures of Title VII, including its statute of limitations. 42 U.S.C. § 12117(a). Consequently, this Court's interpretation of the continuing violation doctrine under Title VII will apply to the ADA.

The ADA requires that employees with disabilities identify their disabilities in order to obtain reasonable accommodation on the job. *Beck v. University of Wisconsin Bd. of Regents,* 75 F.3d 1130, 1134-1135 (7th Cir. 1996). Reasonable accommodation is a modification to a job or the work environment that enables a qualified individual with a disability to attain the same level of performance or enjoy equal benefits of employment as are available to a similarly-situated person without a disability. EEOC: Technical Assistance on Title I of ADA, BNA FEP 405:6981, 6999. Thereafter, the employee and employer must engage in an ongoing interactive dialogue, identifying accommodations that will enable the worker to perform the essential functions of the job. *Beck, ibid.; see* 29 C.F.R. § 1630.2(o)(3) ["informal, interactive process" involving both employer and employee]; 29 C.F.R. Appendix to Part 1630 – Interpretative Guidance on Title I of the Americans with Disabilities Act ["flexible, interactive process"].

The obligation to accommodate an employee's disability is a "continuing duty that is not exhausted by one effort." *McAlindin v. City of San Diego,* 192 F.3d 1226, 1237 (9th Cir. 1999) [internal quotations omitted], quoting *Ralph v. Lucent Technologies, Inc.,* 135 F.3d 166, 172 (1st Cir. 1998) and *Criado v. IBM Corp.,* 145 F.3d 437, 445 (1st Cir. 1998). Moreover, for some disabilities, the employee's condition may change over time, requiring a revisting of appropriate accommodation. Additional discussions may also be required to fine-tune a particular accommodation to meet the needs of both employee and employer. For these reasons, negotiations about accommodations may last beyond the 180- or 300-day limitations period.

The California Supreme Court recently analyzed the continuing violation doctrine in the context of claims of failure to accommodate and disability harassment in *Richards v. CH2M Hill, Inc., supra,* 26 Cal.4th 798. The court noted there was "particularly good reason to view the failure over time to reasonably accommodate a disabled employee as a single course of conduct." 26 Cal.4th at 821. Reasonable accommodation "is often an ongoing process rather than a single action" and "this process may have many facets and take a number of different forms." *Id.* at 821-822. As with harassment, an instance of an employer's failure to accommodate that in isolation may seem trivial "can assume greater significance and constitute a greater injury when viewed as one of a series of failures." *Id.* at 822.[5]

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[5] For this reason, both federal and state courts, applying the ADA or state discrimination statutes, have found a continuing violation for the entire course of an employer's discrimination against employees with disabilities. *See Lewis v. Board of Trustees,* 874 F.Supp. 1299, 1304 (M.D. Ala. 1995); *Bodiford v. State of Alabama,* 854 F.Supp. 886, 891 (M.D. Ala.

As applied to the ADA, the "knew or should have known" standard would require employees with disabilities to file an EEOC charge *each time* the employer failed to provide a particular accommodation within 180 (or 300) days of the time it was first requested. If the employee did not, the employer could claim that, by requesting accommodations, the employee demonstrated awareness of his legal rights and should be barred from asserting that he was entitled to that accommodation. The ADA's requirement of individualized assessment and interactive discussions of possible accommodations would be undermined by a steady stream of discrimination charges, EEOC investigations, and the threat of imminent court litigation. Instead of promoting the necessary communication and cooperation between employees with disabilities and their employers (*Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1285 (7th Cir. 1996)), Amtrak's rule would produce confrontation and controversy.

The "knew or should have known" standard also disregards the enormous external barriers to employment that people with disabilities face. Notably, one of the key Congressional motivations behind the ADA was the staggering level of unemployment for persons with disabilities.[6] While the prospects for employment of people with

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1994); *Martini v. Boeing Co.*, 88 Wash.App. 442, 945 P.2d 248, 254 (1997), *aff'd on other grounds*, 137 Wash.2d 357, 971 P.2d 45 (1999); *Goodman v. Boeing Co.*, 75 Wash.App. 60, 877 P.2d 703, 712-714 (1994), *aff'd on other grounds*, 127 Wash.2d 703, 899 P.2d 1265 (1995).

[6] *See, e.g.*, Senate Comm. on Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess., at 9 (1989) ("Individuals with disabilities experience staggering levels of unemployment and poverty. According to a recent Lou Harris poll not working

disabilities have improved since the passage of the ADA, discrimination and unemployment remain severe problems. These statistics are documented in the N.O.D./ Harris 2000 Survey of Americans with Disabilities ("N.O.D. Survey"), excerpts of which may be found on the website for the National Organization on Disability, www.nod.org. As the report notes, "there has been a significant increase in the percentage of people with disabilities who are able to work and are working from 46% in 1986 to 56% today." But nevertheless, according to the N.O.D. Survey, a decade after the ADA's enactment, "more than 3 out of 10 employed people with disabilities (36%) say they have encountered some form of discrimination in the workplace due to their disabilities, the most prevalent of which is not being offered a job for which they are qualified. More than half (51%) of those who have experienced discrimination say they have been refused a job due to their disabilities."

Given the continued prevalence of discrimination in the American workplace, which dramatically affects the re-employment prospects for people with disabilities, employees with disabilities may delay filing a formal charge of employment discrimination out of fear that it would alienate their employer or even risk their job and health insurance benefits. In short, imposing a "knew or should have known" test in construing the continuing

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is perhaps the truest definition of what it means to be disabled in America. Two-thirds of all disabled Americans between the age of 16 and 64 are not working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled persons, who are not working, say that they would like to have a job. Translated into absolute terms, this means that about 8.2 million people with disabilities want to work but cannot find a job.")

violation doctrine under Title VII would seriously compromise the federally guaranteed civil rights of employees with disabilities.

C. THE CONTINUING VIOLATION DOCTRINE SHOULD BE APPLIED WHERE AN EMPLOYEE IS THE VICTIM OF NUMEROUS SIMILAR DISCRIMINATORY ACTS AND A HOSTILE WORK ENVIRONMENT.

Amtrak's argument that the continuing violation doctrine cannot apply to a "discrete discriminatory act" has no relevance here. Abner Morgan was the victim of *ten* disciplinary and counseling incidents, *five* instances of denial of career opportunities (including denial of training, being barred from an apprenticeship program and being hired as an electrician helper instead of as an electrician) and at least *three* incidents of retaliation. *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008, 1016-17 (9th Cir. 2000). These 18 episodes occurred in the context of a racially hostile environment in which African-American employees were being demeaned, insulted, called "nigger" and "boy" and told to "get [their] black ass" into the office. Significantly, the 18 incidents and the "racially-laden environment" were perpetrated by the same five managers. *Id.*

In its decision, the Ninth Circuit recognized that the numerous incidents were part of a continuing pattern: "These incidents reveal a consistent pattern of similar employment actions (e.g., discipline and denial of professional training) over the entire five-year period of employment, perpetrated by the same core group of managers. *Such incidents are not discrete or isolated.*" 232 F.3d at 1016 [italics added]. The court carefully analyzed the

evidence to determine whether the same kinds of discriminatory conduct occurred both before and within the limitations period. The court also noted that the evidence of each alleged violation "significantly overlaps," so that "segregating them is both a difficult and artificial task." *Ibid.* at n. 16. Viewing the pre-limitations acts in the "context of the totality of Morgan's relationship with Amtrak," the court concluded that the earlier incidents were "part of a series or pattern of discrimination, retaliation, and hostile environment that started nearly contemporaneously with Morgan's employment and continued throughout his tenure." *Id.* at 1017.[7]

Such analysis falls squarely within this Court's oft-repeated warnings that the existence of discrimination must be determined in light of "the record as a whole," "the totality of circumstances," and "all the circumstances." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998); *Harris v. Forklift Systems, Inc., supra*, 510 U.S. at 23; *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69 (1986). *Accord: Andrew v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) [discrimination analysis must concentrate on the overall scenario, not on individual incidents]; *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) [factfinder should not examine each alleged incident of harassment in a vacuum]. A trier of fact might reasonably find that the combined evidence of disciplinary incidents, denials of career opportunities, acts of retaliation, and racially hostile environment

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[7] The fact that the same five managers were responsible for all the discriminatory acts was not necessary for application of the continuing violation doctrine but certainly undercuts Amtrak's argument that these were "discrete" or "isolated" incidents. *Morgan, supra*, 232 F.3d at 1014-1017.

proved that Amtrak managers were "motivated by general hostility to the presence of [African-Americans] in the workplace." *Oncale, supra,* 523 U.S. at 80.

The Ninth Circuit's reasoning is consistent with Section 706(e)'s key phrase, "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1). As noted in *Richards v. CH2M Hill, Inc., supra,* 26 Cal.4th at 818, and discussed *infra,* the dictionary definition of "practice" includes "repeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage." By this definition, the ten incidents of discipline certainly constitute a "practice," as do the five episodes of denial of career opportunities and the three incidents of retaliation. These events were not isolated or discrete acts.

A California court of appeal confronted a similar issue in a sex discrimination case under the California FEHA, *Accardi v. Superior Court,* 17 Cal.App.4th 341 (1993). In *Accardi,* a female police officer was subjected to years of sexual harassment and discrimination. When she later suffered a knee injury, her employer denied her light duty assignments that male officers received and also prepared false medical reports about her. Although only the post-injury incidents were within the FEHA one-year limitations period, the court held the continuing violation doctrine allowed the plaintiff to introduce evidence of the long history of sexual harassment and discrimination. The gist of the plaintiff's complaint, the court stated, was that the police department waged "a decade-long campaign against her," based on an unwritten policy that law enforcement is a "man's job." 17 Cal.App.4th at 350. The denial of light duty and false medical reports may have been undertaken with the same discriminatory purpose – "ridding the police department of female officers." *Id.* at

351. "If credited, these acts constitute a continuous manifestation of a sex-based animus that would bring the prior acts within the statute of limitations." *Ibid.*

Consequently, this case presents no opportunity for this Court to decide whether the continuing violation doctrine can apply to what Amtrak calls a "discrete discriminatory act." Rather, consistent with the Court's emphasis on the "totality of circumstances," the Court should hold that when agents of an employer commit numerous similar discriminatory acts while creating a hostile work environment, the particular incidents should be considered part of the same continuing violation.

D. THE CALIFORNIA SUPREME COURT'S RECENT DECISION IN *RICHARDS v. CH2M HILL* SHOULD GUIDE THIS COURT IN INTERPRETING THE CONTINUING VIOLATION DOCTRINE UNDER TITLE VII.

In *Richards v. CH2M Hill, Inc., supra,* 26 Cal.4th 798, the California Supreme Court recently issued a definitive discussion of the continuing violations doctrine which should serve as guidance to this Court, along with the Ninth Circuit's analysis. Although *Richards* interpreted the California Fair Employment and Housing Act (FEHA), Cal. Gov. Code, §§ 12900 *et seq.*, its reasoning is persuasive in interpreting Title VII because "the anti-discrimination objectives and relevant wording of title VII . . . are similar to those of the FEHA." *Richards, supra,* 26 Cal.4th at 812. Indeed, the language of the FEHA and Title VII statutes of limitations is strikingly similar. The FEHA bars the filing of an administrative complaint more than one year "from the date upon which the alleged unlawful practice . . . occurred." Cal. Gov. Code, § 12960. Title VII provides that a charge shall be filed within 180

(or 300) days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).

Plaintiff Lachi Richards had worked as an engineer for CH2M Hill for four years when in 1988 she was diagnosed with multiple sclerosis and started to use a wheelchair. Immediately thereafter, she began to experience various types of harassment at work. Over the next five years, until her resignation in early 1993, Richards repeatedly asked her employer for accommodations for her disability, including the removal of physical barriers throughout the office. After much delay, the company made some changes but never provided many other requested accommodations.

Richards resigned and filed an administrative complaint with the California Department of Fair Housing (DFEH) and later filed a civil action under the FEHA for disability harassment and discrimination. CH2M Hill moved to exclude evidence of conduct before January 25, 1993, one year before the filing of Richards' administrative complaint. The trial court denied the motion, and at trial Richards was permitted to introduce evidence of, and seek damages for, the entire five-year period, 1988-1993. The jury found CH2M Hill had created a hostile work environment and failed to reasonably accommodate Richards' disability and awarded sizable damages.

The California Court of Appeal reversed, holding the trial court had misapplied the continuing violation doctrine and had improperly allowed the jury to award damages for injuries occurring outside the one-year limitations period. Citing many of the federal cases relied on by Amtrak herein, the court held the statute of limitations was tolled only up to the point Richards "knew or should have known" that her rights were being violated. Under

that test, all employer conduct occurring before the limitations period was time-barred.

The California Supreme Court reversed, rejecting the "knew or should have known" standard. After reviewing numerous approaches to the continuing violation doctrine under federal case law, the high court held that an employer's series of unlawful actions should be viewed as a single, actionable course of conduct if (1) the actions are sufficiently similar in kind; (2) they occur with sufficient frequency; and (3) they have not acquired such a degree of permanence that the employee is on notice that further efforts at informal conciliation with the employer to end discrimination or harassment would be futile. 26 Cal.4th at 802, 823. The statute of limitations will begin to run when *either* (1) the discriminatory "course of conduct" is brought to an end by the employee's termination, resignation, or constructive discharge or by the employer's cessation of such conduct, *or* (2) the employer makes clear to the employee "in a definitive manner" that further efforts at informal conciliation will be futile. *Id.* at 823.[8]

Richards reasoned that employees should be encouraged to pursue informal conciliation with their employer rather than immediately initiating litigation by filing an administrative complaint with the DFEH. "[I]t is contrary to the purposes of the FEHA to interpret its statute of limitations to encourage premature litigation at the

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[8] This conduct by the employer must be more than simply a statement denying liability for a particular act in the course of conduct or a statement that insufficient evidence exists to corroborate a particular occurrence or to take corrective action. Instead, the employer must make clear that the employee should no longer file complaints or expect any further investigation or informal conciliation efforts.

expense of informal conciliation." *Id.* at 820. Requiring an employee to file with the administrative agency while he or she is still employed "would reduce sharply any chance of conciliation between employer and employee and draw the Department into investigations that might have been avoided through informal conciliation." *Ibid.* In most cases, an employee would feel compelled to resign "to avoid the awkwardness of maintaining employment while pursuing litigation against his or her employer." *Ibid.* An employer that creates or tolerates a persistent pattern of harassment or other discrimination cannot complain of the employee's delay in filing when the employee retains employment in hopes informal conciliation will succeed. *Id.* at 822.

In short, said the *Richards* court, the statute of limitations should not be interpreted to give a victim of discrimination two unappealing choices: (1) resigning and bringing legal action soon after the first signs that his or her rights have been violated, or (2) attempting to persist in the informal conciliation process and risk forfeiting the right to bring such an action altogether. *Id.* at 821.

Richards' emphasis on conciliation over litigation and on using informal procedures to resolve worksite problems echoes this Court's approach in recent Title VII cases. In *Burlington Industries, Inc. v. Ellerth, supra,* 524 U.S. 742, the Court stressed "Congress' intention to promote conciliation rather than litigation in the Title VII context" and praised the EEOC's policy of encouraging companies to adopt internal complaint procedures so employees can report harassing conduct before it becomes severe or pervasive. *Id.* at 764. *Accord: Faragher v. City of Boca Raton, supra,* 524 U.S. at 806 [Title VII's "primary objective" is "not to provide redress but to avoid harm."]. Accordingly, in *Ellerth* and *Faragher,* the

Court held that in hostile environment sexual harassment cases involving no tangible employment action against the employee, an employer could claim an affirmative defense to liability only if it had established internal complaint procedures to correct harassing behavior and the harassed employee had unreasonably failed to use those procedures.

Similarly, in *Ford Motor Co. v. EEOC,* 458 U.S. 219, 228 (1982), the Court declared the "primary objective" of Title VII is to "bring employment discrimination to an end," and the "preferred means for achieving this goal is through '[c]ooperation and voluntary compliance.' " [Quoting *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417 (1975) and *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974)] The victims of job discrimination "want jobs, not lawsuits," the Court stated. *Ford Motor Co., supra,* 458 U.S. at 230. Accordingly, the Court adopted a legal rule designed to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants. *See also EEOC v. Shell Oil Co.,* 466 U.S. 54, 77 (1984) [Congress hoped to encourage employers to comply voluntarily with Title VII]; *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 358 (1995) [Congress intended remedial measures in Title VII and ADEA to serve as "spur or catalyst" to cause employers to "self-examine and to self-evaluate their employment practices."]

Richards' interpretation of the term "unlawful practice" in the FEHA is directly applicable to Title VII, which uses the nearly identical term "unlawful employment practice." As the California court noted (26 Cal.4th at 818), both lay and legal dictionaries define the term "practice" to mean a course of conduct. For example, Webster's defines "practice" as "to do or perform often,

customarily, or habitually; to make a practice of." Webster's New International Dictionary, p. 1937, col. 3 (2d ed. 1958). Similarly, Black's Law Dictionary defines "practice" as "[r]epeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage." Black's Law Dictionary, p. 1172, col. 1 (6th ed. 1990). Thus, in the context of a continuing violation, "unlawful practice" refers to the entire discriminatory course of conduct. Precisely the same is true of Title VII's analogous term, "unlawful employment practice." Viewing a pattern of related discriminatory acts as a single actionable wrong is consistent with this language. So long as the employee files his charge within the limitations period following the last illegal act, the charge is timely.

Richards was also influenced by the California statute's mandate that its provisions "shall be construed liberally for the accomplishment of the purposes thereof." Cal. Gov. Code, § 12993(a). To carry out the FEHA's purpose of safeguarding the right of employees to hold employment without discrimination, this liberal construction must extend to interpretations of the FEHA's statute of limitations, the Supreme Court held. *Richards, supra,* 26 Cal.4th at 819. But Title VII also requires a liberal interpretation. *Haynes v. Williams,* 88 F.3d 898, 901 (10th Cir. 1996). It is equally fitting that such an interpretation apply to Title VII's statute of limitations. *See* 29 C.F.R. § 1601.34 ["rules and regulations shall be liberally construed to effectuate the purpose and provisions of Title VII."].

Congress clearly so intended in 1972, when it amended Title VII to extend the EEOC charge-filing period from 90 to 180 days. In the Final Conference Committee Report, Congress proclaimed that it intended to adopt prior court decisions which "have shown an

inclination to interpret this time limitation so as to give the aggrieved person the *maximum benefit of the law. . . .*" Section-by-Section Analysis of H.R. 1746, 118 Cong. Rec. 7167 (Senate), 118 Cong. Rec. 7565 (House) [italics added]. The Conference Report specifically stated that Congress intended to "continue" "existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence. . . ." *Ibid.* The report also provided that "other interpretations of the courts maximizing the coverage of the law are not affected." *Ibid. See* footnote 2, *supra,* for early continuing violations decisions.

In short, the California Supreme Court's thoughtful interpretation of continuing violation in *Richards v. CH2M Hill* is consistent with the language, purposes, and legislative history of Title VII. This court should apply *Richards'* reasoning in interpreting the continuing violations doctrine under Title VII.

E. ADOPTION OF THE NINTH CIRCUIT OR THE *RICHARDS* STANDARD FOR CONTINUING VIOLATION WILL NOT UNFAIRLY HARM EMPLOYERS.

Employers will not be unfairly disadvantaged if this Court adopts the continuing violation doctrine as applied by the Ninth Circuit or by the California Supreme Court in *Richards v. CH2M Hill, supra.*

Amtrak's argument that the continuing violation doctrine should not be available to employees who "knowingly" let the limitations period expire has no basis in fact. There is no empirical evidence that workers deliberately wait to file EEOC charges to secure some alleged

strategic or financial advantage. Rather, as demonstrated *supra*, employees delay in filing formal discrimination charges with the EEOC or a state agency because they do not know their rights, they do not recognize the employer's conduct as discriminatory, they are trying to work out problems informally with their employer, or they fear retaliation.

At any rate, employers have ample protection against employees who delay filing without justification. In hostile environment sexual harassment cases, where even Amtrak concedes the continuing violation doctrine can properly apply, an employee's unreasonable failure to use internal complaint procedures provides an affirmative defense against liability. *Burlington Industries, Inc. v. Ellerth, supra*, 524 U.S. 742; *Faragher v. City of Boca Raton, supra*, 524 U.S. 775. In ADA cases, employers are on notice because employees with disabilities must affirmatively request reasonable accommodation and thus employers can prepare against a possible EEOC charge.

Moreover, delay does not benefit employees financially because Title VII severely restricts back pay and damages. Back pay is limited to two years from the discrimination charge, regardless of when it is filed. 42 U.S.C. § 2000e-5(g)(1). Compensatory and punitive damages, originally unavailable, are permitted but severely limited since the 1991 amendments. For employers with more than 500 employees, compensatory and punitive damages together are capped at $300,000. For smaller employers, the cap ranges from $50,000 to $200,000. 42 U.S.C. § 1981a(b)(3).[9]

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[9] By comparison, no such limits apply under California's FEHA. In *Richards*, the plaintiff was awarded nearly $1 million in non-economic damages. In *Weeks v. Baker & McKenzie*, 63

Further, the traditional arguments in favor of strict enforcement of statutes of limitations – a defendant's interest in marshaling evidence while memories are fresh and witnesses are available, the value of finality and repose, and the avoidance of "staleness" – actually are consistent with, and indeed support, a broad continuing violation theory in the employment context.

Employers have a unique ability to marshal evidence and find witnesses to defend employee lawsuits complaining of a history of discrimination. Employers routinely document interactions with their employees. They keep personnel files in which they record information about all aspects of their employees' work lives. Many employers, particularly large companies like Amtrak, employ human resources specialists trained to analyze and record personnel information. Employers are required by law to preserve many employee records for years. *See, e.g.*, 29 C.F.R. § 516.5 [payroll records must be kept three years]. Employers can also locate current and past employees who can act as witnesses in any employment-related litigation.

The defendant's interest in finality and repose may justify a narrow reading of the applicable statute of limitations in a case involving a *single* wrongful act. By definition, however, a continuing violation case involves an *ongoing* pattern of discrimination and/or harassment. An employer who has engaged in such misconduct should not be allowed to rely on the policy favoring finality and repose. The harm which such an employer

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Cal.App.4th 1128 (1998), a sexual harassment case, the plaintiff won $50,000 in compensatory damages and over $3.5 million in punitive damages.

continues to inflict on its worker offsets any claim to those values.

Finally, staleness is not an issue in the context of continuing violation cases. This Court so held in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which involved the Fair Housing Act of 1968, 42 U.S.C. §§ 3601, *et seq.* The Housing Act's statute of limitations, which tracks the language of section 706(e) of Title VII, requires a civil action to be commenced within 180 days "after the alleged discriminatory housing practice occurred." 42 U.S.C. § 3612(a). Finding that five incidents of racial steering (four of which were outside the limitations period) constituted a continuing violation, the court held the complaint was timely because it was filed within 180 days of the last occurrence. Although statutes of limitations are intended to keep stale claims out of court, the court observed, "Where the challenged violation is a continuing one, the staleness concern disappears." *Id.* at 380.

F. SINCE THIS COURT'S PREVIOUS INTERPRETATIONS OF SECTION 706(e) DID NOT INVOLVE THE CONTINUING VIOLATION DOCTRINE, THEY ARE DISTINGUISHABLE AND IRRELEVANT TO THIS CASE.

The continuing violation doctrine, as presented in this case, involves a "serial violation" – a series of related illegal acts, one or more of which is within the limitations period. *Morgan v. National Railroad Passenger Corp., supra,* 232 F.3d at 1015. This Court's prior decisions interpreting section 706(e) did not address a serial violation. In the previous cases, which are discussed below, there was only one illegal act, which was time-barred. Consequently, past decisions do not provide any guidance in interpreting the continuing violation doctrine here.

In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court held that an academic employee who claimed his denial of tenure was discriminatory had to file an EEOC charge within 180 days of the tenure decision, not within 180 days of his discharge one year later. The only discriminatory act was the denial of tenure, the court observed. The termination was simply a delayed but inevitable consequence of the tenure denial. As a result, the continuing violation doctrine did not apply. *Accord: Chardon v. Fernandez*, 454 U.S. 6 (1981).

In *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), a female flight attendant was terminated in 1968, pursuant to a "no-marriage" rule applied only to women. She did not file an EEOC charge. In 1972, the plaintiff was rehired but the employer refused to credit her with lost seniority. At that point, the plaintiff filed a charge. As in *Ricks*, the court found there was no present violation of the statute. The only discriminatory act was the plaintiff's termination four years earlier. The seniority system, which was neutral in operation, merely gave present effect to a past act of discrimination. Consequently, the continuing violation doctrine did not apply.

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), involved a discriminatory seniority system which had been in place for three years without challenge. When female employees later experienced the effects of the discriminatory system by being demoted, they filed EEOC charges and sued. Relying on *Ricks* and *Evans*, the Court held the plaintiffs' charges were time-barred because the only illegal act was the discriminatory adoption of the seniority system, which had occurred outside the limitations period. Again, the continuing violation doctrine was inapplicable because the case involved only one discriminatory act. Congress legislatively overruled

Lorance in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-5(e)(2).

Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976), did not address the continuing violation doctrine. *Robbins & Myers* held that the statutory period for filing an EEOC charge was not tolled during the pendency of grievance procedures under a collective bargaining agreement.

Finally, *Bazemore v. Friday*, 478 U.S. 385 (1986), held that a public entity which racially discriminated in salaries before it was covered by Title VII could not perpetuate the discrimination after Title VII applied to it. Section 706(e) was not involved. *Bazemore* has been interpreted to mean that the continuing violation doctrine applies in a disparate pay case and the charge-filing period runs from the last discriminatory paycheck. *See, e.g., Cardenas v. Massey*, 2001 U.S. App. LEXIS 22372 (3d Cir. October 16, 2001); *Anderson v. Zubieta*, 180 F.3d 329, 335-337 (D.C. Cir. 1999); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 345-351 (4th Cir. 1994).

CONCLUSION

The judgment of the court of appeal should be affirmed.

Respectfully submitted,

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